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Scotland's Named Person Scheme

A Case Study of Article 5 of the United Nations Convention on the Rights of the Child in Practice

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Abstract

The Scottish Government's proposal to introduce a "Named Person" scheme was intended to improve child protection and wellbeing in Scotland, by allocating an identified Named Person to every child in Scotland. The scheme was met by considerable concern from a range of parties, and was challenged in the courts on the basis that the data sharing provisions infringed the data protection and Article 8 of the European Convention on Human Rights (ECHR) privacy rights of children and parents. As a result of the complexities of introducing lawful data sharing provisions, the scheme has now been scrapped, without ever being introduced. However, at no point was there any sustained analysis of the impact of Article 5 of the United Nations Convention on the Rights of the Child (UNCRC) on the Named Person scheme: to what extent would the Scottish Government proposals have helped parents meet their obligations under Article 5? Or would they in fact have infringed parents' and children's rights? This article provides a case study of Article 5 in practice, by setting out the background to the now-defunct Named Person scheme, before going on to analyse its interaction – and compliance – with the State Party's obligations under Article 5.

Keywords

Article 5, UNCRC – Named Person scheme – Scotland – child protection – parental responsibilities and rights – data protection – Article 8 privacy

1 Introduction

This article considers the impact of Article 5, UNCRC on the proposed Named Person scheme in Scotland – legislated for in 2014 and abandoned in 2019, without ever having been implemented. The core premise of this scheme was that every child in Scotland should be allocated a Named Person: an adult who would be a single identified point of contact, who knew the child, and could help support and advise the child and parents. Despite laudable aims, the scheme was dogged by controversy, including a successful challenge in 2016 in the UK Supreme Court (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51). Yet in addition to the many criticisms levied against the proposals, a further question can be asked: to what extent would the appointment of a Named Person have supported or hindered the ‘responsibilities, rights and duties’ of parents under Article 5? Despite the scheme being cancelled, it nevertheless offers a valuable case study on a legislative proposal which was designed to improve support for children and parents, but which did not apparently take into account the provisions of Article 5.

After setting out the core elements of the Named Person scheme, I will briefly outline the controversy and litigation that hampered its introduction, before exploring the ramifications of Article 5 in this context.

2 The Scheme and Its Background

2.1 *The Scheme*

The Named Person scheme was introduced in the Children and Young People (Scotland) Act 2014 (hereafter the “2014 Act”), although the relevant part of the statute was never brought into force and, in September 2019, the Deputy First Minister announced the Scottish Government would not be proceeding with the scheme (Scottish Parliament Business, 2019). If it had been implemented, the scheme would have seen a Named Person appointed to *every* child in Scotland. “Child” here was defined as a child or young person up to 18 years old (2014 Act, s. 97(1)).¹ Typically, the local authority would have been responsible for making arrangements for provision of a Named Person (2014 Act, s. 21), unless the child was still of pre-school age (2014 Act, s. 20), or was of school age

1 The only exception, whereby no Named Person was to be appointed, was for children who are members of any of the regular forces. Thus, a 16-year old in the Army would not have an appointed Named Person: s. 21(1) and (4). Moreover, where a child was in the reserve forces, the 2014 Act would not apply when the child was subject to service law: s. 19(6). These were both grounds for concern in themselves.

but attended an independent school, or was in secure accommodation, or in legal custody, in which case other specified organisations would have appointed a Named Person in respect of the child (2014 Act, s. 21). As a general rule, the Named Person would typically have been the local Health Visitor for the first five years of the child's life and then, when the child moved to school, a teacher or the school headteacher. There was no reference in the 2014 Act to what happened when a 16- or 17-year old got married: presumably they (and their spouse, if also 16 or 17) would still have a Named Person.²

The Named Person was intended to exercise specified statutory functions, all in order to 'promote, secure or safeguard the wellbeing of the child or young person' (2014 Act, s. 19(5)). These functions were:

1. Advising, informing or supporting the child or young person, or a parent of the child or young person,
2. Helping the child or young person, or a parent of the child or young person, to access a service or support, or
3. Discussing, or raising, a matter about the child or young person with a service provider or relevant authority, and
4. Such other functions as are specified by [the 2014] Act or any other enactment as being functions of a Named Person in relation to a child or young person (2014 Act, s. 19(5)(a) and (b)).

In order to fulfil these functions, the service provider (encompassing the Named Person) and the local authority were to have a right to share information where, in the opinion of the information holder, it would be relevant for the exercise of the Named Person functions, ought to be provided, and would not otherwise prejudice any criminal investigation or prosecution of crime (2014 Act, s. 26(1)-(4)). This information sharing could of course have comprised the personal data of the child or young person and parents and, as framed in the 2014 Act, the consent of the child, young person or parent would not be required – although in providing any information, the information holder (not necessarily the Named Person), was directed to 'ascertain and have regard to the views of the child', with regard to the child's age and maturity (2014 Act, s. 26(5) and (6)).

One of the critical factors was that the scheme was designed to apply to *every* child, whether previously identified as "at risk" or not. While the 2014 Act did not seek to impose an obligation on children or parents to use their allocated Named Person, there was also no facility to opt out of the scheme. This

2 Of course, the fact that Scots law permits 16- and 17-year olds to get married is a separate issue. In its most recent Concluding Observation, the UN Committee on the Rights of the Child recommended that, 'The State party raise the minimum age of marriage to 18 years across all devolved administrations': CRC/C/GBR/CO/5; 5, para. 19.

blanket operation was intended to ensure the scheme operated without distinction: this was a valid aim in its own right, to treat all children alike and thereby reduce stigma. To this extent it was comparable to other schemes, such as the Health Visitor scheme, whereby every pre-school child has an allocated health visitor to help address any queries or concerns. Likewise, the Scottish “baby box” scheme offers every mother-to-be a box of essential supplies for her newborn child. Because it is offered to all mothers, there is no stigma attached to dressing your baby in the baby box clothes, for example, or using the other provisions.³

2.2 *The Rationale*

The rationale for the Named Person scheme was set out in the Government’s Policy Memorandum. There were at least three benefits sought to be achieved. First, the Named Person could act as an identified source of help when no other source is obvious: ‘Where children and young people face issues that are not easily addressed by the practitioners with whom they and their families are in regular contact, it is not always clear who they can turn to for help’ (Scottish Parliament Policy Memorandum, 2013: para. 66). By providing a Named Person, every child and their family would have an identifiable point of contact and support. Second, a Named Person was intended to be able to identify the need for early intervention in the lives of children who need support, with the hope that the earlier the intervention, the better the outcome. This was one reason why the scheme was to apply to all children, and not just those identified as being at risk: by the time they have come to the attention of the local authority, the window for early intervention would typically have closed.

Thirdly, the scheme aimed to ensure that children did not “fall through the cracks” – typically where different agencies were involved, but there was no collaboration between them, to work together for the child. Thus, schools, the police, and the General Practitioner service might all be involved with the same child, but there will not always be an established pathway for communication, or any overarching strategy for the child. Having a Named Person as a single point of communication and support was designed to help close this gap, by ensuring improved communication and collaboration:

The Named Person will usually be a practitioner from a health board or an education authority, and someone whose job will mean they are already working with the child. They can monitor what children and young people need, within the context of their professional responsibilities, link

3 Details of the scheme and the contents of the baby box are available at: <https://www.mygov.scot/baby-box/>.

with the relevant services that can help them, and be a single point of contact for services that children and families can use, if they wish. The Named Person is in a position to intervene early to prevent difficulties escalating. The role offers a way for children and young people to make sense of a complicated service environment as well as a way to prevent any problems or challenges they are facing in their lives remaining unaddressed due to professional service boundaries. Their job is to understand what children and young people need and quickly make the connection to those services that can help when extra help is needed. (Scottish Parliament Policy Memorandum, 2013: para. 68)

Numerous reviews into the tragic deaths of children at the hands of their parents or carers had identified both a failure to act timeously and a lack of communication between agencies as key failings (Sutherland, 2017: 295–296). The evidence therefore pointed to the fact that, even where there was involvement in a child's life by a range of services, this was not always sufficient to protect them (Sutherland, 2017: 303). The Named Person service was intended to tackle these failings and, in doing so, to promote a 'change in the culture and practice of all services that affected the lives of children, young people and their families' (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 30.)

Prior to the introduction of the 2014 Act, the scheme had already been trialled in a number of areas within Scotland, such as the Highland Pathfinder Project, which had been positively received (Scottish Parliament Policy Memorandum, 2013: para. 86; Sutherland, 2017: 304). There had also been a consultation on the scheme, again with generally positive results – albeit with some concerns about the guidance to Named Persons on sharing information between different bodies:

The proposal to provide a Named Person for every child and young person was strongly supported by stakeholders, both through the public consultation and the engagement undertaken. However, concern was expressed about the existing legal framework for information sharing. This was felt to be confusing and potentially insufficient to enable the role of the Named Person to operate as well as anticipated. In particular, there were concerns regarding the sharing of information about children where consent is not given, both between others and the Named Person, and the Named Person and other professionals. It was felt that this could lead to professionals being unsure as to when information should be shared (Scottish Parliament Policy Memorandum, 2013: 75, emphasis added).

Despite these concerns regarding what was (at the time) viewed as a fairly technical issue, there certainly did not appear to be anything to prevent the 2014 Act being implemented. There can be no doubt that the scheme it envisaged had a clear and worthy rationale on the face of it, and had been the subject of lengthy and detailed planning, consultation and testing. Why then was it abandoned without ever being applied?

3 Concerns with the Scheme: Controversy and Litigation

Concerns about the operation of the scheme were present from when the draft bill was first introduced. These typically reflected the competing concerns of parents, on the one hand, and those likely to be Named Persons on the other. From the service provider perspective, concerns included resourcing and training of the employees to be Named Persons and, critically, liability. The 2014 Act made clear that 'responsibility for the exercise of the Named Person functions lies with the service provider rather than the Named Person' (2014 Act, s. 19(8)). A further apprehension was whether an employee of the state can truly hold the state to account, in situations where a dispute arises between the child or family and the local authority. If, for example, the child's complaint was with the school, and the Named Person was a teacher at the school, would that teacher be able to act as an independent advocate for the child and family? And, perhaps most significantly given the existing failings in state support for children at risk, 'disquiet was occasioned by the prospect of resources being diverted to monitor vast numbers of children who have no demonstrable need for state intervention, when over-stretched social work departments are unable to fulfil their responsibilities to children who are already on their radar due to concerns about their care' (Sutherland, 2017: 305). In a particularly distressing twist, one of the children killed by his parents in the year the 2014 Act was introduced, Liam Fee, had been in a local authority area where a precursor of the Named Person scheme was in place (Sutherland, 2017: 303–4). Would there have been sufficient resources allocated to the new scheme to implement it effectively? Absent such resources, the death of Liam Fee suggested that failings would continue.

Opposition also came from parents and groups representing parents. Despite the clearly stated aim of the scheme, to support children and families and secure early intervention to maximise beneficial outcomes, there were strong critics from the outset. The focus of the concerns were on the unwanted – and allegedly unwarranted – state interference with family life that could result from the powers of the Named Person. A campaign group, No2NP, was formed

to contest the legislation, arguing that, 'The Scottish Government's planned Named Person scheme will undermine parents' responsibility for their own children and allow state officials unprecedented powers to interfere with family life.'⁴

A legal challenge was mounted, contesting the appointment of a Named Person to every child in Scotland: *Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* ([2015] CSOH 7). There were seven petitioners, comprising both charities and individuals: The Christian Institute; Family Education Trust (an English charity which researches the causes and consequences of family breakdown); The Young ME Sufferers ("TYMES") Trust; Care (Christian Action Research and Education); James and Rhianwen McIntosh; and Deborah Thomas. They claimed that they were 'acting in the public interest as responsible members of and participants in civil society... and concerned about what they perceive to be an excess or misuse of power reflected in the [Named Person] provisions...' (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 7). Two of the petitioners were parents who argued that, in accordance with their Christian beliefs, raising their family is a God-given responsibility placed upon them and not the State (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 8).

The challenge was rejected at first instance in the Outer House of the Court of Session and again on appeal to the Inner House (*The Christian Institute and Others v. The Scottish Ministers* [2015] CSIH 64). The campaigners appealed to the UK Supreme Court (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51). Despite the impetus being their objection to state interference in family life, the petitioners' legal claim focused on whether the scheme was beyond the competence of the Scottish Parliament. The petitioners alleged the 2014 Act was not lawful because it breached the European Convention on Human Rights and European Union law, specifically regarding the data sharing provisions. Thus, the challenge was that the powers of the Named Person to share personal data about children with a range of other agencies were not compliant with the (then) data protection regime and Article 8, ECHR privacy rights.⁵ Despite the Scottish Government's success at the first two

4 <https://no2np.org/> (accessed 19 June 2019).

5 A third strand of argument advanced on behalf of the petitioners was that the 2014 Act was outside the legislative competence of the Scottish Parliament, as a devolved legislature, as it legislated on a matter reserved to Westminster, being data protection. The UKSC concluded that the purpose of the legislation, being to promote the wellbeing of children and young people, did not 'relate to' data protection: [2016] UKSC 51: paras. 63–66.

hearings, the petitioners reversed their fortunes at the third attempt. The UK Supreme Court held that the scheme, as drafted, would not be compliant with data protection legislation:

In summary, we conclude that the information-sharing provisions of ... the Act ... are incompatible with the rights of children, young persons and parents under article 8 of the ECHR because they are not 'in accordance with the law' as that article requires ... [and] may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents, through the sharing of private information (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51: para. 106).

The Supreme Court therefore referred the data sharing proposals back to the Scottish Government, to review and revise the data sharing guidance.

Following the Scottish Government defeat in that case in 2016, the Named Person scheme was put on hold, pending revised data sharing provisions which would comply with Article 8, ECHR and the new GDPR regime for data protection. In an attempt to achieve this compliance, the Scottish Government introduced the Children and Young People (Information Sharing) (Scotland) Bill in September 2017.⁶ The Scottish Government also established a GIRFEC Practice Development Panel in late 2017, with the objective of developing a data sharing Code of Practice. The Panel was due to report in September 2018, but its final report was delayed. Eventually, in August 2019, minutes from the GIRFEC Practice Development Panel meeting of 21 March 2019 were published (GIRFEC Practice Development Panel, 2019). These indicated that the Panel would not be delivering a data sharing Code: 'a statutory Code of Practice that must be applied in all situations is not the right thing to do at this time, which is brave'. Although such a Code could be produced, 'it would not be desirable as the complexity of this would mean it would not be easy to understand or apply in practice' (GIRFEC Practice Development Panel, 2019). Just weeks after the publication of these Minutes, the Deputy First Minister announced:

⁶ The Scottish Parliament's Education and Skills Committee heard evidence on the draft bill from a wide range of parties, including the Law Society of Scotland and the Faculty of Advocates (20 September 2017); Dr Ken Macdonald, Head of ICO Regions; and Maureen Falconer, Regional Manager, the Information Commissioner's Office (4 September 2017). The written evidence of the Faculty of Advocates acknowledged that the issues raised by the UKSC were not 'easy to resolve': <http://www.advocates.org.uk/media/2498/final-faculty-response-15-aug-2017-named-person.pdf>.

We will now not underpin in law the mandatory named person scheme for every child. We will withdraw the Children and Young People (Information Sharing) (Scotland) Bill and repeal the relevant legislation. Instead, existing voluntary schemes that provide a point of contact for support will continue, under current law (Scottish Parliament Business, 2019).

From a data protection perspective, the primary impediment to implementing the scheme was the need for a lawful basis for processing the personal data of children (and their parents). The comprehensive nature of the intended scheme, in applying to all children, meant that many lawful bases were unsuitable (General Data Protection Regulation 2018, articles 6, 7 and 9; Data Protection Act 2018, ss. 8, 10 and 11). Seeking consent from children or parents was simply not relevant for a scheme which was meant to apply on a blanket basis, rather than an opt-in one. Even if consent had been appropriate to provide a lawful basis, there would have been complexities in seeking consent from children, and determining whether they have capacity. There is a presumption that children over 12 have capacity, but this can be rebutted (Data Protection Act 2018, s. 208). Other grounds for processing, such as the vital interests of the data subject, were also effectively excluded by the blanket application: it would not be in the *vital* interests of every child to have a Named Person appointed. Instead, “vital interests” would be likely to be limited to those identified as “at risk”. In the absence of some other broad “public interest” justification, securing a lawful basis for processing the relevant data of (almost) all children in Scotland, appears to have been an insurmountable hurdle.

However, the focus of this article is not on the challenges of ensuring a data protection compliant regime, nor on the litigation itself. Instead, this article aims to explore the Article 5, UNCRC dimension to the proposed scheme. Two aspects of the judgments will therefore be considered: the views of the judiciary on the impact of the Named Person scheme on family life; and the implications of Article 5 UNCRC for the scheme.⁷

⁷ An examination of the proposals in the scheme against the UNCRC as a whole, including key articles such as Articles 3 (best interests), 12 (views of the child) and 16 (privacy), is beyond the scope of this paper.

4 The Named Person Scheme and Family Life: The Judicial Perspective

At every stage of the legal proceedings, the judiciary gave explicit recognition to the extensive work that had gone in to developing the scheme, and its positive aims. In the words of Lord Pentland:

the policy behind the named person service has been developed carefully over more than a decade. The process of policy development has been informed by a high level of input from experts in child welfare, education, health and care. The basic aim of the policy and the legislation giving effect to it is that the wellbeing of children will be promoted and safeguarded by providing for every child and his or her family a suitably qualified professional who can, if necessary, act as a single point of contact between the child and any public services from which the child could benefit. The named person will be in a position to identify any emerging challenges for the child at an early stage and to provide information about and coordinate access to any necessary services for the child. The named person service is based on the GIRFEC philosophy [Getting It Right For Every Child]. As the policy documents explain, that approach is grounded in putting the best interests of every child at the heart of decision-making; it encourages professionals to work together; and it advocates preventative work and early intervention to support children, young persons and their families (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 39).

On appeal, the Inner House of the Court of Session rejected claims about excessive state interference with the role of parents:

The mere creation of a named person, available to assist a child or parent, no more confuses or diminishes the legal role, duties and responsibilities of parents in relation to their children than the provision of social services or education generally. It has no effect whatsoever on the legal, moral or social relationships within the family. *The assertion to the contrary, without any supporting basis, has the appearance of hyperbole ...* The legislation does not involve the state taking over any functions currently carried out by parents in relation to their children (*The Christian Institute and Others v. The Scottish Ministers* [2015] CSIH 64: para. 68, emphasis added.)

The Supreme Court too was apparently supportive of the intentions of the Scheme:

The public interest in the flourishing of children is obvious. The aim of the Act, *which is unquestionably legitimate and benign*, is the promotion and safeguarding of the wellbeing of children and young persons ... the policy of promoting better outcomes for individual children and families is not inconsistent with the primary responsibility of parents to promote the wellbeing of their children. Improving access to, and the coordination of, public services which can assist the promotion of a child's wellbeing are legitimate objectives which are sufficiently important to justify some limitation on the right to respect for private and family life (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51: para. 91, emphasis added).

The fact that the Supreme Court approved the aim of the Act, whilst holding that it did not comply with Article 8, ECHR and the data protection regime, led to the curious position whereby *both* sides claimed the Supreme Court decision as a victory: the petitioners because the scheme was defeated on the data sharing side; the Scottish Government because the defeat was *only* on the data sharing side, with the express recognition that it would be lawful, benign and unexceptionable if the data sharing guidance was lawful (Sutherland, 2017: 306).

However, in reaching their conclusion, the Supreme Court explicitly acknowledged that the aim of improving public services to promote child wellbeing can justify some limit on the right to respect for private and family life. Is this an implication that the Named Person scheme would indeed have impinged on that right? And did it also engage Article 5, UNCRC?

5 Is the Named Person Scheme Compliant with Article 5, UNCRC?

5.1 *Assessing Article 5 and the Named Person Scheme*

Article 5 states:

Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance

in the exercise by the child of the rights recognized in the present Convention.

To what extent did the proposed Named Person scheme respect the ‘responsibilities, rights and duties of parents’ to provide ‘in a manner consistent with the evolving capacity of the child’ the appropriate ‘direction and guidance’ in the child’s exercise of his or her Convention rights?

In fact, rather unusually for domestic litigation in Scotland, the petitioners referred to Article 5, UNCRC, briefly, in their pleadings. The judge, Lord Pentland, summarised their submissions on this point:

In support of their claims of infringement of [ECHR] Convention rights, the petitioners maintained that the enactment of the provisions in Part 4 of the Act was also incompatible with the rights enjoyed by the fifth to seventh petitioners under a number of international instruments, namely

1. article 16(3) of the Universal Declaration of Human Rights 1948;
2. article 23(1) of the International Covenant on Civil and Political Rights 1966 (reference was also made to article 17);
3. article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966;
4. and articles 3(2) and 5 of the UN Convention on the Rights of the Child 1969. [sic]

Although differently expressed, all these measures aim to safeguard the family and the home against disproportionate interference by the State; they recognise the family as having the primary role in the upbringing and education of children.

One might also refer to article 24(1) of the Charter of Fundamental Rights of the European Union (‘the CFR’); this provides that children have the right to such protection and care as is necessary for their wellbeing (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 41, emphasis added).

It seems to have been accepted that all these international provisions were relevant to the dispute and, as Lord Pentland said, ‘informed the proper interpretation and application of the [ECHR] Convention rights of the fifth to seventh petitioners’ (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 41).

But having sprinkled a medley of Declarations, Conventions, Covenants and Charters into their case, no specific line of argument was predicated on any of them:

The petitioners did not, however, advance any stand-alone line of argument based on the terms and effect of the international measures. Rather, they submitted that they formed part of the backdrop against which their claims of infringement of [ECHR] Convention rights should be evaluated (*Petition of the Christian Institute and Others for Judicial Review of the Children and Young People (Scotland) Act 2014* [2015] CSOH 7: para. 41, emphasis added).

Thus, while accepting that Article 5, UNCRC was relevant, the nature of its relevance and its application to the issue at hand were not further explored. There was also no consideration of Article 5 in the context of the UNCRC as a whole, nor the possible impact of other Convention articles, such as Article 3 (best interests of the child) or Article 16 (privacy).

The Supreme Court also reflected on the role of the UNCRC here:

As is well known, it is proper to look to international instruments, such as the UNCRC, as aids to the interpretation of the ECHR. The Preamble to the UNCRC states:

‘the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.’

Many articles in the UNCRC acknowledge that it is the right and responsibility of parents to bring up their children ...; article 5 requires States Parties to respect the responsibilities, rights and duties of parents ... to provide appropriate direction and guidance to the child in the exercise of his or her rights under the Convention (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51: para. 72).

Again, no specific challenge to the Named Person scheme was advanced on the back of Article 5, UNCRC. However, the Supreme Court did explore the need for Article 5, UNCRC and the imperative for the state to allow families freedom in how they function. The Court recognised that: ‘There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies’ (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51: para. 73.) Article 5, UNCRC plays a fundamental role in

ensuring the state cannot interfere without good cause in the life of the family, as a guard against oppression:

Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way (*The Christian Institute and Others v. The Lord Advocate* [2016] UKSC 51: para 73; *In Re B (Children)* [2008] UKHL 35: para. 20).

But there is another side to this coin. The very real concerns expressed by the Supreme Court have to be balanced against the potential harm to children which can occur behind closed doors: parents cannot plead privacy to inflict cruelty or neglect with impunity. As the Committee on the Rights of the Child observed in a report from a 1994 Discussion Day:

Children are often abused, neglected, and their right to physical integrity ignored, on the assumption that the privacy of the family automatically confers on parents the ability to make correct and informed judgments with respect to 'the responsible upbringing of future citizens' (General Day of Discussion Report, 1994: 194–195).

To what extent would the Named Person scheme have succeeded in balancing these conflicting risks: over-interference in private life vs the risk of abuse in private? Had it been implemented, would it have interfered with the 'responsibilities, rights and duties' of parents? It is also important to remember that the Article 5 rights of parents are given in the context of the child exercising Convention rights. It specifies that these responsibilities, rights and duties are given to parents to enable them 'to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance' to the child (Sutherland, 2020: TBC). Thus, both elements must be considered: the rights of parents, and the evolving capacity of the child.

5.2 *The Responsibilities and Rights of Parents*

Opposition to the scheme was frequently framed in terms of interference with the "rights of parents". However, it is arguable that these objections stemmed from a misconceived understanding of parental responsibilities and rights, both under the UNCRC and domestic legislation, whereby parents at times focus on the notion of their "rights" without understanding the substance of those rights, or the relationship to their parallel responsibilities. Parental rights

in Scotland – as in many jurisdictions – are there to enable parents to fulfil their parental responsibilities. Section 1 of the Children (Scotland) Act 1995 sets out the parental responsibilities, and section 2 the corresponding parental rights, shaped to ensure they can meet these responsibilities. (Even the ordering of these sections underlines the importance of responsibilities, given that they are set out first, in section 1, with the rights flowing therefrom in section 2.)

The responsibilities imposed on parents include the duties to 'safeguard and promote the child's health, development and welfare' (Children (Scotland) Act 1995, s. 1(1)(a)) and to 'to provide, in a manner appropriate to the stage of development of the child (i) direction; (ii) guidance to the child' (Children (Scotland) Act 1995, s. 1(1)(b)). The appointment of a Named Person, who would also be able to provide advice and support, would not automatically interfere with the responsibility of the parents to do so. Moreover, the reference here to the 'stage of development' reflects the evolving capacity of the child, which is also an important part of Article 5, UNCRC. The parental rights are specifically given to parents to enable them to fulfil their responsibilities (Children (Scotland) Act 1995, s. 2): they go no further than that. And one of the rights is the right 'to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing' (Children (Scotland) Act 1995, s. 2(1)(b)). Again, this requires parents to take account of the evolving capacity of their child.

5.3 *Evolving Capacity of the Child*

It is arguable that the Named Person scheme sought to reflect and respect the evolving capacity of the child – a core element of Article 5. By providing a source of support and advice to the child, the scheme would have allowed children to decide as and when they were ready to seek help themselves, without having to rely on (or be constrained by) their parents. It therefore attempted to encourage children to take responsibility for raising any issues with the Named Person, and presumably as children develop, and their capacity evolves, they would be able to seek assistance that reflects their own needs and abilities.

When the significance of evolving capacity is recognised, the true impact of Article 5 becomes clear. No parent has an absolute and unfettered right to raise their child: parenting must be seen in the framework of parental responsibilities and rights, and against the background of the child's evolving capacity. The Named Person would have been there to support the child through providing guidance and support, and also help support the parents in fulfilling *their* responsibilities and rights. To this extent, the proposals in the Named Person scheme could certainly be viewed as in keeping with parental responsibilities and rights and Article 5, rather than in conflict.

6 Concluding Comments

As this article has shown, the Named Person scheme had the potential to support both parents and children in the context of Article 5. However, the concern remains that the scheme would nevertheless have encroached on Article 5 because of its blanket application. While this had a clear rationale in facilitating early intervention – and in avoiding stigma – it is at the heart of all the problems that were faced by the initiative. By imposing the scheme on all children, it became arguable that the state was no longer respecting their evolving capacity, through denying them the right to choose to opt in. Public opposition to the scheme also centred round this wholesale application. Moreover, this was the key factor causing problems for the Scottish Government in finding a lawful basis for processing and sharing personal data – a critical element of the Named Person proposals. While the emphasis of this article has been on Article 5, the ultimate stumbling block for the Scottish Government was the data sharing element. Nevertheless, with the scheme now abandoned, there is a real risk that children are denied the support they need, which will also fail to respect their evolving capacity in choosing to seek guidance from others as well as parents. The Scottish Government must therefore seek another way to protect children, through enhanced early intervention and guidance – while also respecting the responsibilities of parents and, critically, the evolving capacity of the child. Further developments in this fraught field are awaited with interest.

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